85-155

No.

Office-Supreme Court, U.S.
FILED
JUL 26 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1985

THOMAS A. COUGHLIN, III, CHARLES P. HERNANDEZ (*sic* Charles P. Hermanderz) HAROLD J. SMITH, N. DE SANTOS,

Petitioners,

against

EMMANUEL D. PATTERSON,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

ROBERT ABRAMS
Attorney General of the State of New York, Attorney for Petitioners
The Capitol
Albany, NY 12224
(518) 474-8352

ROBERT HERMANN
Solicitor General
PETER H. SCHIFF
Deputy Solicitor General
MARTIN A. HOTVET
Assistant Attorney General
Of Counsel

Dated: July 19, 1985

36pp

Question Presented

Whether a prisoner placed in restrictive confinement after a disciplinary hearing in which the hearing officer failed to comply with established State procedural rules was denied due process of law where there were adequate State judicial remedies to redress the violation of State rules and the rules themselves conformed to constitutional requirements?

Table of Contents

	Page
Question Presented	i
Opinions Below	2
Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Statement of The Facts	3
Reasons for Granting the Writ	5
1. The Second Circuit's decision below is not compatible with the reasoning of *Parratt v. Taylor* and *Hudson v. Palmer*	5
2. The Second Circuit's decision below conflicts with decisions of other Courts of Appeals	9
Conclusion	11

Index to Appendix

Page

Unreported Memorandum Decision, Dated December 5, 1983 ..... A1

Order of the District Court, Dated March 6, 1984... A4

Decision of Second Circuit, Dated May 9, 1985 .... A5

TABLE OF AUTHORITIES

CASES:

Albery v. Reddig, 718 F2d 245 (7th Cir 1983) 10

Baker v. McCollan, 443 US 137 (1979) 7

Bonner v. Coughlin, 517 F2d 1311 (7th Cir 1975), *mod en banc* 545 F2d 565 (7th Cir 1976), *cert. denied* 435 US 932 (1978) 8

Burke, Matter of, v. Coughlin, 97 AD2d 862 (3d Dept 1983) n7

Cohen v. City of Philadelphia, 736 F2d 81 (3d Cir 1984, *cert. denied* 105 S Ct 434 (1985)..... 10

Collins v. King, 743 F2d 248 (5th Cir 1984) 9

Creative Environments, Inc. v. Estabrook, 680 F2d 822 (1st Cir 1982), *cert. denied* 459 US 989 (1982) 10

Daniels v. Williams, 748 F2d 229 (4th Cir 1984), *cert. granted,* 53 USLW 3626 (Feb. 26, 1985) n6

Page

DeMauro, Matter of, v. LeFevre, 91 AD2d 1156 (3d Dept 1983) n7

Ellis v. Hamilton, 669 F2d 510 (7th Cir) *cert. denied sub nom.* Ellis v. Judge of the Putnam Circuit Court, 459 US 1069 (1982) 10

Estades, Matter of, v. Coughlin, 101 AD2d 299 (3d Dept 1984) n6, n7

Giglio v. Dunn, 732 F2d 1133 (2d Cir 1984) n7

Hewitt v. Helms, 459 US 460 (1983) n6

Hudson v. Palmer, 468 US ____, 104 S Ct 3194 (1984) ..... *passim*

Johnson, Matter of, v. Smith, 83 AD2d 721 (3d Dept 1981) n7

Kelemen, Matter of, v. Coughlin, 100 AD2d 732 (4th Dept 1984) n7

Kumar v. Marion County Common Pleas Court, Division of Domestic Relations, 704 F2d 908 (6th Cir 1983) 10

Logan v. Zimmerman Brush Co., 455 US 422 (1982) 8

Love v. Coughlin, 714 F2d 207 (2d Cir 1983) n7

Majid v. Henderson, 533 F Supp 1257 (NDNY), *affd* 714 F2d 115 (2d Cir 1982) n6

Page

McCrae v. Hankins, 720 F2d 863 (5th Cir 1983) 10

Parratt v. Taylor, 451 US 527 (1981) ..... *passim*

Powell v. Ward, 542 F2d 101 (2d Cir 1976), 487 F Supp 917 (SDNY 1980), *mod* and *affd* 643 F2d 924 (2d Cir), *cert. denied,* 454 US 832 (1981) n6

Roy v. City of Augusta, 712 F2d 1517 (1st Cir 1983). 10

Selcov, Matter of, v. Coughlin, 98 AD2d 733 (2d Dept 1983) n7

Snowden v. Hughes, 321 US 1 (1944) 7

Thibodeaux v. Bordelon, 740 F2d 329 (5th Cir 1984) 10

Williams, Matter of, v. LeFevre, 90 AD2d 579 (3d Dept 1982) n6, n7

Wolff v. McDonnell, 418 US 539 (1974) ..... *passim*

UNITED STATES CONSTITUTION

28 USC § 1254(1) 2

42 USC § 1983 ..... *passim*

NEW YORK STATE STATUTES

Correction Law Law § 24 ..... n7

Page

CPLR Article 78 ..... *passim*

Jud L., Court of Claims Act §§ 8-10 ..... n7

NEW YORK REGULATIONS

7 NYCRR 253.2(d) n6

7 NYCRR 253.4(b) (1) n6

MISCELLANEOUS

Smolla, "The Displacement of Federal Due Process Claims By State Tort Remedies: Parratt v. Taylor and Logan v. Zimmerman Brush Company", 1982 University of Illinois Law Review 831 8

Turner, "When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts", 92 Harvard L. Rev. 610 (1979) 5

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985.

THOMAS A. COUGHLIN, III, CHARLES P. HERNANDEZ (*sic* Charles P. Hermanderz), HAROLD J. SMITH, N. DESANTOS,

Petitioners,

against

EMMANUEL D. PATTERSON,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Petitioners Thomas A. Coughlin, III, Charles P. Hernandez, Harold J. Smith, and N. DeSantos respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on May 9, 1985.

Opinions Below

The unreported memorandum decision dated December 5, 1983 of the United States District Court for the Western District of New York and the decision of the Second Circuit, dated May 9, 1985, reported at 761 F2d 886, appear in the Appendix hereto, *infra*, pp A1 and A5.

Jurisdiction

The judgment of the Second Circuit was entered on May 9, 1985. The petition for certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked under 28 USC § 1254 (1).

Constitutional and Statutory Provisions Involved

The United States Constitution, Fourteenth Amendment reads in pertinenent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law;"

42 USC § 1983 reads in relevant part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State * * * subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Statement of The Facts

The essential facts are set out in the Second Circuit's decision (App, pp A6-A9). At all relevant times, plaintiff was an inmate in New York's Attica Correctional Facility. On April 9, 1982, he was charged with violation of institutional rules and placed in restrictive confinement in the segregation unit (the Special Housing Unit, or "SHU") as a result of a fighting incident. On April 16, 1982, his Superintendent's Proceeding commenced; it was completed on April 20. He was found guilty of the charges; the penalty was 60 days in SHU and 60 days loss of good time.

Plaintiff administratively appealed the determination, which was affirmed by the Special Housing Review Board on July 21, 1982. Plaintiff also instituted a judicial proceeding, pursuant to New York Civil Practice Law and Rules Article 78, by letter to New York Surpeme Court Justice Conable, dated May 7, 1982. In his letter, plaintiff alleged that his rights had been violated because the Superintendent's Proceeding had not been held and completed within 7 days and because none of his witnesses had been called or interviewed. The court treated the letter as a petition and issued an order to show cause dated May 18, 1982, returnable on June 9, 1982.

Plaintiff was released from SHU on June 9, 53 days after the determination of the charges. On June 10, the hearing was held in the Article 78 proceeding; plaintiff was assigned an attorney. Many months later, on March 4, 1983, a stipulation was entered which provided that the good time lost by plaintiff would be restored, institutional files referring to the Superintendent's Proceeding held on April 20 would be expunged, and plaintiff could not be held in SHU pursuant to the April 20 determination.

Plaintiff commenced the underlying action in the USDC for the Western District of New York. His complaint alleged that assigning him to SHU deprived him of due process of law because the hearing was constitutionally inadequte, viz., his witnesses were not called, the hearing officer was not fair and impartial, and, although he was in SHU, the hearing was not conducted within 7 days. The District Court granted defendants' motion to dismiss the complaint for failure to state a claim, holding that the State's procedural rules governing the hearing conformed to due process requirements and the remedies provided by the State for breach of the rules were adequate.

The Second Circuit reversed, holding that the plaintiff had stated a claim by showing that the hearing actually accorded him had not conformed to constitutional requirements as set forth in *Wolff v. McDonnell,* 418 US 539 (1974). The court stated that "due process requires more than the mere *promulgation* of laws and regulations which, if followed, would preserve the most fundamental of rights"; the execution of those laws and regulations must also conform to due process. 761 F2d at 891 (App, p A14). Distinguishing *Parratt v. Taylor,* 451 US 527 (1981) and *Hudson v. Palmer,* 468 US ____, 104 S Ct 3194 (1984), the court reasoned that, although the denial of due process may have been "unauthorized" in this case, "the deprivation of liberty at issue here does *not* appear to have been 'unauthorized' as that term is meant in *Parratt*"; the responsible state officials who had the power to grant plaintiff a hearing obviously knew that he was in peril of being deprived of his liberty and in fact gave him a hearing, albeit a deficient one; thus, the Court of Appeals held, the deprivation was neither "random" nor "unauthorized". 761 F2d at 892 (App, pp A14-A15).

Reasons for Granting the Writ

Certiorari should be granted because the decision below not only conflicts with applicable decisions of this Court in this important area of § 1983 litigation, but is also in direct conflict with decisions of other federal courts of appeal. The decision plainly affects a very large number of cases* and, if not reversed, would open the federal courts to the innumerable claims of procedural errors in prisoner litigation where the state courts provide full remedies.

1. The Second Circuit's decision below is not compatible with the reasoning of *Parratt v. Taylor* and *Hudson v. Palmer.*

The decision below is in conflict with this Court's decisions in *Parratt v. Taylor,* 451 US 527 (1981), and *Hudson v. Palmer,* 468 US ____, 104 S Ct 3194 (1984). In *Parratt,* a state prisoner sued prison officials under § 1983, claiming that their negligent loss of a hobby kit he had ordered from a mail-order catalogue deprived him of property without due process of law, in violation of the Fourteenth Amendment. This Court held that the due process clause had not been violated because the State made available a meaningful post-deprivation remedy. This Court reasoned that pre-deprivation process was impractical because the loss was occasioned not by any established State procedure, but rather by a random, unauthorized act by a State employee in violation of applicable procedures, which the State could not have anticipated. *Id.* at 541-542.

In *Hudson v. Palmer,* the reasoning of *Parratt* was extended to a case involving the intentional deprivation of a prisoner's property by a guard. This Court could "discern

*See Turner, "When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts", 92 Harvard L. Rev. 610 (1979).

no logical distinction between negligent and intentional deprivations of property insofar as the 'practicability' of affording pre-deprivation process is concerned. The State can no more anticipate and control in advance the random and unauthorized intentional conduct of its employees than it can anticipate similar negligent conduct." 104 S Ct at 3203.

We can discern no principled basis why the reasoning of those cases does not equally apply here. As in *Parratt* and *Hudson,* the deprivation in this case, albeit of liberty, not property,* resulted from a random, unauthorized mistake by a state official in failing to follow the established state procedures, viz., New York's regulations implementing the due process requirements of *Wolff v. McDonnell.***

*The issue whether the reasoning of *Parratt* and *Hudson* applies to deprivations of liberty is currently pending before this Court. *Daniels v. Williams,* 748 F2d 229 (4th Cir 1984), *cert. granted,* 53 USLW 3626 (Feb 26, 1985). Here, the Second Circuit did not expressly address the issue.

**A New York regulation implemented *Wolff's* mandate that "the inmate shall be permitted to call witnesses on his/her behalf provided that doing so does not jeopardize institutional safety or correctional goals." 7 NYCRR 253.4(b) (1); *see Wolff v. McDonnell,* 418 US at 566. The regulations also included *Wolff's* mandate that the presiding officer be impartial. 7 NYCRR 253.2 (d); *see Wolff v. McDonnell,* 418 US at 570-571. A departmental rule, not promulgated as a regulation, provided that the hearing be commenced within 7 days. *Matter of Estades v. Coughlin,* 101 AD2d 299 (3d Dept 1984); *Matter of Williams v. LeFevre,* 90 AD2d 579 (3d Dept 1982). *Wolff v. McDonnell* did not mandate such a rule; however, the Second Circuit has intimated that due process requires such a rule. *See Powell v. Ward,* 542 F2d 101, 103-4 (2d Cir 1976), 487 F Supp 917 (SDNY 1980), *mod* and *affd* 643 F2d 924 (2d Cir) *cert. denied,* 454 US 832 (1981); *see also, Majid v. Henderson,* 533 F Supp 1257, 1272 (NDNY), *affd* 714 F2d 115 (2d Cir 1982). The validity of the intimation is suspect after *Hewitt v. Helms,* 459 US 460 (1983), in which this Court sustained a delay while an inmate remained restrictively confined for over a month between an incident of misbehavior and a *Wolff* hearing.

As in *Parratt* and *Hudson,* there was no question of the adequacy of the state judicial remedies.* New York courts have been vigilant to redress the type of errors which occurred in this case.** Indeed, the underlying disciplinary determination here was nullified in plaintiff's state court proceeding.

The Second Circuit erred by focusing on the rights (under *Wolff v. McDonnell)* guaranteed Patterson, rather than the remedies available to him. The import of the Second Circuit decision is that any mistake in a *Wolff* hearing amounts to a violation of due process without regard to the nature of the error (here, a hearing officer's unauthorized failure to follow state regulations in one particular case) or the judicial remedies available to correct the administrative mistake. That reading of governing principles is wrong. The Fourteenth Amendment protects only against deprivations without due process. *Parratt v. Taylor,* 451 US at 537. It does not provide an insurance policy against unauthorized mistakes made by state officials. *Baker v. McCollan,* 443 US 137, 145-146 (1979); *Showden v. Hughes,* 321 US 1, 15 (1944) (Frankfurter, J., concurring).

---

*Article 78 of the New York Civil Practice Law and Rules, "which is an amalgam of the common law writs of certiorari to review, mandamus, and prohibition, made available (to plaintiff) both a hearing and a means of redress." *Giglio v. Dunn,* 732 F2d 1133, 1134 (2d Cir 1984). A damages remedy was available to him in the New York Court of Claims. New York Correction Law § 24; New York Jud L., Court of Claims Act §§ 8-10; *see Love v. Coughlin,* 714 F2d 207, 209 (2d Cir 1983).

**See e.g., *Matter of Estades v. Coughlin,* 101 AD2d 299 (3d Dept 1984) (violation of 7-day rule); *Matter of Williams v. LeFevre,* 90 AD2d 579 (3d Dept 1982) (violation of 7-day rule); *Matter of Johnson v. Smith,* 83 AD2d 721 (3d Dept 1981) (violation of 7-day rule); *Matter of Kelemen v. Coughlin,* 100 AD2d 732 (4th Dept 1984) (right to witnesses); *Matter of Selcov v. Coughlin,* 98 AD2d 733 (2d Dept 1983) (right to witnesses); *Matter of Burke v. Coughlin,* 97 AD2d 862 (3d Dept 1983) (right to witnesses); *Matter of DeMauro v. LeFevre,* 91 AD2d 1156 (3d Dept 1983) (right to witnesses).

Although the hearing officer was authorized by state law to conduct a hearing to penalize plaintiff, he clearly was not authorized by state law to violate the regulations controlling the hearing. The Second Circuit's fundamental error was its failure to distinguish between these two things—the actions of the State *qua* State and the actions of its employees in derogation of State rules. In *Hudson*, this Court dismissed an argument essentially identical to that accepted by the Second Circuit in this case to distinguish *Parratt*.

> "This argument reflects a fundamental misunderstanding of *Parratt*. There we held that post deprivation procedures satisfy due process because the *State* cannot possibly know in advance of a negligent deprivation of property. Whether an individual employee himself is able to foresee a deprivation is simply of no consequence. The controlling inquiry is whether the State is in a position to provide for predeprivation process." (104 S Ct at 3204).

Likewise, the issue here, in Fourteenth Amendment procedural due process terms, is not whether an individual State employee violates a constitutionally prescribed procedure, but whether the State system as a whole, including its judicial mechanisms for redress of administrative errors, insures the proper execution of such procedures. *See Logan v. Zimmerman Brush Co.*, 455 US 422 (1982); Smolla, "The Displacement of Federal Due Process Claims By State Tort Remedies: Parratt v. Taylor and Logan v. Zimmerman Brush Company", 1982 University of Illinois Law Review 831. As noted in *Hudson*, *Parratt* had expressly relied upon the rationale of *Bonner v. Coughlin*, 517 F2d 1311 (7th Cir 1975), *mod en banc* 545

F2d 565 (7th Cir 1976), *cert denied,* 435 US 932 (1978), that the "State's action is not complete unless or until the State fails to provide an adequate post deprivation remedy * * *". *Id.,* 104 S Ct at 3203, n12.

In this case, as in *Parratt* and *Hudson,* the *State* could not have been expected to anticipate a failure by its employees to follow the established procedures. Significantly, the Second Circuit did not suggest additional pre-deprivation procedural safeguards the State could have employed to avoid the errors committed here. Following the rationale of *Parratt* and *Hudson,* plaintiff was not denied due process because no further pre-deprivation procedures were practicable and New York's post deprivation judicial proceedings were adequate to remedy any harm to plaintiff occasioned by the errors in the administrative hearing.

2. The Second Circuit's decision below conflicts with decisions of other Courts of Appeals.

Certiorari should also be granted because the decision below conflicts with the decisions of other Circuits in this important and evolving area of section 1983 litigation with respect to which the Courts of Appeal have had such difficulty. *See Parratt v. Taylor,* 451 US at 533-534.

Other Circuits have recognized the distinction between procedural rules created by the State *qua* State and the erroneous execution of those rules by State employees.

The Fifth Circuit, relying upon *Parratt* and *Hudson,* reached a diametrically opposite conclusion from the Second Circuit's in a case arising out of a deficient prison hearing. In *Collins v. King,* 743 F2d 248 (5th Cir 1984), a prisoner alleged that he had been deprived of due process when he had been placed in restrictive custody after a

disciplinary hearing which was allegedly deficient because the hearing tribunal was not impartial. The court held that the complaint did not state a claim for deprivation of liberty without due process because it failed to plead that Louisiana rules authorized partial tribunals or that available Louisiana judicial remedies were insufficient to redress any impropriety in the administrative proceeding. The court explained that the prison official, who was allegedly biased, had simply taken it upon himself to sit on the tribunal, without any regulating sanction—a random and unpredictable action; therefore, there was no violation of due process. *Id.*, 743 F 2d at 254; *McCrae v. Hankins,* 720 F2d 863, 868 (5th Cir 1983) ("the constitution demands due process, not error free decision making"). *See also Thibodeaux v. Bordelon,* 740 F2d 329 (5th Cir 1984).

Similarly, the First and Third Circuits in non-prison cases have squarely held that mistakes by administrative bodies do not create a procedural due process claim so long as the administrative scheme itself is constitutional and any errors are subject to correction by the State's judiciary. *Cohen v. City of Philadelphia,* 736 F2d 81, 86 (3d Cir 1984), *cert. denied,* 105 S Ct 434 (1985); *Creative Environments, Inc. v. Estabrook,* 680 F2d 822, 832, n9 (1st Cir 1982), *cert. denied,* 459 US 989 (1982); *see Albery v. Reddig,* 719 F2d 245, 249, n7(7th Cir 1983); *Roy v. City of Augusta,* 712 F2d 1517, 15, 23-24 (1st Cir 1983); *see also Ellis v. Hamilton,* 669 F2d 510, 514 (7th Cir), *cert. denied sub nom. Ellis v. Judge of the Putnam Circuit Court,* 459 US 1069 (1982); *Kumar v. Marion County Common Pleas Court, Division of Domestic Relations,* 704 F2d 908 (6th Cir 1983). In those cases, the errors were made by a person or body with at least as much authority as the hearing officer here.

The Second Circuit's reasoning and result simply cannot be reconciled with those in the decisions discussed above.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Dated: Albany, New York
July 19, 1985

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Petitioners

ROBERT HERMANN
Solicitor General

PETER H. SCHIFF
Deputy Solicitor General

MARTIN A. HOTVET
Assistant Attorney General

Of Counsel

APPENDIX.

Unreported Memorandum Decision, Dated December 5, 1983.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

EMMANUEL D. PATTERSON,

Plaintiff,

v.

THOMAS A. COUGHLIN, III, CHARLES P. HEMANDY (*sic* Charles P. Hernandez), HAROLD J. SMITH, N. DE SANTOS,

Defendants.

Civ-83-418T

The plaintiff brings this action pursuant to 42 U.S.C. Section 1983 alleging, in substance, that defendants' failure to adhere to establish state procedures in confining him to the Special Housing Unit at Attica Correctional Facility, see 7 N.Y.C.R.R. Section 300 *et seq.*, resulted in a deprivation of his liberty without due process of law in violation of the Fourteenth Amendment to the United States Constitution. Defendants now move to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim.

In *Parratt v. Taylor,* 451 U.S. 527 (1981) the Supreme Court held that a negligent deprivation of property without a prior hearing was not a due process violation where an adequate post-deprivation remedy was available to the plaintiff. This holding has been extended to include deprivations of liberty where no meaningful pre-deprivation hearing was practicable. *See Daniels v. Williams,* ____ F.2d ____, 52 U.S.L.W. 2156 (4th Cir., decided August 24, 1983); *see also, Giglio v. Dunn,* ____ F. Supp. ____ (W.D.N.Y. Civ-83-601 decided September 15, 1983) (holding that the circumvention of established state procedures, which if followed would guarantee due process, was not in itself a due process violation where adequate state remedies existed).

In the present case, plaintiff alleges that defendants failed to strictly comply with the procedures established in New York's Code of Rules and Regulations for Confinement in a Special Housing Unit. Because the procedures existed, but were allegedly not followed, no meaningful predeprivation hearing was possible. *See Giglio v. Dunn, supra.* Plaintiff did seek redress pursuant to New York Civil Practice Law and Rules Article 78 to force defendants to comply with the established procedures and thus, was given an opportunity to be heard at a meaningful time and in a meaningful manner. *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965). Although ". . . the remedy may not be all that [plaintiff] may have hoped for under Section 1983 [this] does not mean that the state remed[y] [is] not adequate to satisfy the requisites of due process". *Kumar v. Marion City Common Pleas Court,* 704 F.2d 908, 910

(6th Cir. 1983). Accordingly, defendants' motion to dismiss plaintiff's complaint must be granted.

So Ordered.

Dated: Rochester, New York,
December 5, 1983.

MICHAEL A. TELESCA
United States District Judge

Order of the District Court, Dated March 6, 1984.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

EMMANUEL D. PATTERSON,

Plaintiff,

v.

THOMAS A. COUGHLIN, III, CHARLES P. HEMANDY (*sic* Charles P. Hernandez), HAROLD J. SMITH, N. DE SANTOS,

Defendants.

Civ-83-418T

Plaintiff has moved for reconsideration of the Order of this Court entered December 5, 1983 dismissing his complaint. Plaintiff's motion is denied as no valid reason for reconsideration has been presented. Plaintiff's proper remedy is an appeal to the Second Circuit Court of Appeals.

So Ordered.

Dated: Rochester, New York,
March 6, 1984.

MICHAEL A. TELESCA
United States District Judge

Decision of Second Circuit, Dated May 9, 1985.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 904 — August Term, 1984

(Argued: March 12, 1985 Decided: May 9, 1985)

Docket No. 84-2266

EMMANUEL D. PATTERSON,

Plaintiff-Appellant,

v.

THOMAS A. COUGHLIN, III, CHARLES P. HERNANDEZ (sic CHARLES P. HERMANDERZ), HAROLD J. SMITH, N. DE SANTOS,

Defendants-Appellees.

Before:

TIMBERS, CARDAMONE and PIERCE, *Circuit Judges.*

Appeal from an order entered December 5, 1983 in the Western District of New York, Michael A. Telesca, *District Judge*, dismissing a pro se complaint in an action pursuant to 42 U.S.C. § 1983 (1982) for failure to state a claim upon which relief can be granted.

Reversed and remanded.

Robert B. Calihan, New York, N.Y., *for appellant.*

Martin A. Hotvet, Assistant Attorney General, Albany, N.Y. (Robert Abrams, Attorney General, and Robert Hermann, Solicitor General, Albany, N.Y., on the brief), *for appellees.*

TIMBERS, *Circuit Judge:*

This appeal is from a judgment entered December 5, 1983 in the Western District of New York, Michael A. Telesca, *District Judge*, dismissing a pro se complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. The appeal presents the question of whether a claim is stated under 42 U.S.C. § 1983 (1982) when the complaint alleges that a state prisoner was placed in isolation by state officials in violation of state law and without being afforded a prior hearing that conforms to the due process requirements enunciated in *Wolff* v. *McDonald*, 418 U.S. 539 (1974). The district court held that *Parratt* v. *Taylor*, 451 U.S. 527 (1981), required dismissal of the complaint because the state provides an adequate postdeprivation remedy. We disagree. We reverse and remand.

I.

For purposes of this appeal we accept as true the allegations set forth in the complaint. We summarize only those facts and prior proceedings believed necessary to an understanding of our rulings on the legal issues raised on appeal.

Appellant Emmanuel D. Patterson is, and at all times relevant to this action was, an inmate of the Attica Correctional Facility at Attica, New York. Appellees

are Thomas A. Coughlin III. the Commissioner of the New York State Department of Correctional Services; Harold J. Smith, the Commissioner of the Attica Correctional Facility; Charles P. Hernandez, Director of the Special Housing Review Board; and N. DeSantos, a Captain at Attica.

On April 9, 1982, a fight broke out between two other inmates at Attica. Appellant, who asserts that he was not involved in the altercation, was placed in the facility's Special Housing Unit (SHU). On April 12, appellant appeared before the Prison Adjustment Committee and was charged with "Assault 1.5 and Interference with an employee 1.75". A Superintendent's Hearing was convened on April 16 to consider the charges but was adjourned until April 20.

Appellee DeSantos was the hearing officer at the April 20 hearing. The only witness who testified was the guard who claimed to be the subject of appellant's assault. Appellant was not permitted to call any witnesses in his defense nor did DeSantos interview any such witnesses. Appellant was found guilty of both charges. He was sentenced to confinement in the SHU for sixty days and loss of sixty days "good time". Appellant appealed the decision at the Superintendent's Hearing to appellees Smith and Coughlin. On July 21, 1982, that decision was affirmed by the Housing Review Board.

In the meanwhile, appellant filed an Article 78 proceeding in the Supreme Court of the State of New York, County of Wyoming, in which he sought immediate release from the SHU and restoration of the sixty days good time. Just prior to his scheduled appearance in the Supreme Court, and shortly before his sixty-day sentence

had been served,[1] he was released from the SHU. A hearing was held in the Supreme Court on June 10, 1982. Appellees at that hearing were ordered to produce the record of the Superintendent's Hearing. That record was never produced. A second hearing was held in the Supreme Court on February 25, 1983.

On March 4, 1983, the Supreme Court entered an Order of Stipulation dismissing appellant's petition with prejudice but ordering that appellees "through their agents or employees not hold the [appellant] in confinement in Attica'[s] Special Housing Unit because of the disposition issued at [appellant's] Superintendent's Proceeding of April 20, 1982 at the Attica Correctional Facility." The order specifically provided that appellees had stipulated to restore appellant's good time and to expunge any reference to the disciplinary proceeding from appellant's file.

On or about April 6, 1983, appellant filed his pro se complaint, on a form used by prisoners who are not represented by counsel, in the District Court for the Western District of New York. At the same time, he moved for leave to proceed in forma pauperis and for appointment of counsel; on May 10, 1983, Judge Telesca granted the former, but denied the latter.[2]

On August 15, 1983, appellees moved pursuant to Fed. R. Civ. P. 12(b)(6), to dismiss the complaint for

---

[1] Appellant alleges that he was detained in the SHU for a total of 65 days—12 days while the Superintendent's Hearing was pending and 53 days of disciplinary detention. Since the Superintendent's Hearing was constitutionally deficient, as appellees concede, it is as if appellant never received a hearing at all. It therefore is unnecessary for us to determine whether the 12 days spent in the SHU before the hearing was unconstitutionally lengthy. *See Powell* v. *Ward*, 542 F.2d 101, 103 (2 Cir. 1976) (requiring disciplinary hearing within seven days of confinement in the SHU).

[2] On this appeal, appellant has been represented by able counsel appointed by this Court.

failure to state a claim upon which relief could be granted, or, in the alternative, for summary judgment pursuant to Fed. R. Civ. P. 56. Apparently no documentary evidence ever was produced, despite the district court's order of August 1, 1983 requiring production of the record of the Superintendent's Hearing.[3] The district court, treating the motion as one under Rule 12(b)(6), dismissed the complaint in a Memorandum Decision and Order dated December 5, 1983 which in relevant part states:

> "In the present case, plaintiff alleges that defendants failed to strictly comply with the procedures established in New York's Code of Rules and Regulations for Confinement in a Special Housing Unit. Because the procedures existed, but were allegedly not followed, no meaningful predeprivation hearing was possible. . . . Plaintiff did seek redress pursuant to New York Civil Practice Law and Rules Article 78 to force defendants to comply with the established procedures and thus, was given an opportunity to be heard at a meaningful time and in a meaningful manner."

As indicated above, we reverse and remand, for the reasons stated below.

---

[3] In a letter dated June 28, 1983 addressed to Judge Telesca, appellees' counsel, an Assistant Attorney General for the State of New York, stated that the Attica Facility no longer maintained the records that the district court ordered to be produced because the state had expunged appellant's file pursuant to the Order of Stipulation entered in the state court in the Article 78 proceeding. We note that no explanation for the failure to produce the record in the state court in the Article 78 proceeding is found in the record on this appeal. The Assistant Attorney General stated in his letter to Judge Telesca, however, that copies might be available from other sources. We assume that, upon the remand which we are ordering, those copies will be produced.

II.

Recovery under 42 U.S.C. § 1983 (1982) is premised upon a showing, first, that the defendant has denied the plaintiff a constitutional or federal statutory right and, second, that such denial was effected under color of state law. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 150 (1970). Appellant here alleges a deprivation of his liberty interest and a denial of the procedural safeguards guaranteed by the due process clause of the Fourteenth Amendment. That the liberty interest at issue here is of constitutional dimension is not contested. *E.g.*, *Hewitt* v. *Helms*, 459 U.S. 460, 472 (1983); *Sher* v. *Coughlin*, 739 F.2d 77, 81 (2 Cir. 1984). Moreover, it is not claimed that the officials' conduct did not amount to "state action", which is a prerequisite to finding a constitutional violation, or that it did not occur under color of state law. The only issue presented for our decision, therefore, is whether, upon the facts alleged in the complaint, there has been a denial of constitutionally-mandated procedures.

In its simplest formulation, due process requires an opportunity to be heard "at a meaningful time and in a meaningful manner". *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965); *Giglio* v. *Dunn*, 732 F.2d 1133, 1135 (2 Cir.), *cert. denied*, — U.S. —, 105 S.Ct. 328 (1984). Determining precisely the process that is due, however, is more complicated than this simple statement might suggest. The level of procedural safeguards that must be afforded before the government may deprive an individual of a protected interest is determined by reference to (1) the private interest at stake, (2) the risk of error inherent in the use of one form of procedure over another, and (3) the interest of the government. *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976). *See also Cleveland Board of*

Education v. *Loudermill*, — U.S. —, — (1985), 54 U.S. L.W. 4306, 4308 (U.S. March 19, 1985); *Hewitt* v. *Helms*, *supra*. 459 U.S. at 473. Thus, a tenured public employee is guaranteed notice of the charges against him, an explanation of the evidence in the employer's favor and an opportunity to present "his side of the story" *before* his employment is terminated. *Loudermill*, *supra*, — U.S. at —, 53 U.S.L.W. at 4309. Moreover, a formal post-deprivation evidentiary hearing must be provided before the employee's loss may become final. *Id.* — U.S. at —, 53 U.S.L.W. at 4310.

The procedural safeguards that are required when an individual's liberty is at stake must at least equal those required before he may be deprived of his property, even when the individual's liberty already is curtailed by the fact of being incarcerated in a correctional facility. *Wolff* v. *McDonnell*, 418 U.S. 539, 558 (1974). Thus, an inmate who is facing prison disciplinary charges that could result in punitive segregation is entitled, at a minimum, to advance written notice of the charges against him and of the evidence available to the factfinder. He must be permitted to marshal the facts and prepare his defense. A written record of the proceedings must be kept. The inmate must be allowed to call witnesses and present documentary evidence in his defense. *Id.* at 564-66; *McCann* v. *Coughlin*, 698 F.2d 112, 120-21 (2 Cir. 1983).

In *Hewitt* v. *Helms*, *supra*, the Supreme Court held that administrative segregation of a prison inmate—where the inmate posed a threat to the safety of other inmates and prison employees and where an investigation into the charges against the inmate was continuing—required only "an informal, non-adversary review of the

information supporting respondent's administrative confinement, including whatever statement respondent wished to submit, within a reasonable time after confining him to administrative segregation." *Id.* at 472. Where, as here, the state can show no such compelling interest, and the sole purpose of the confinement is punishment, the *Mathews* balancing test tips in favor of the inmate's liberty interest. The state, therefore, is required to provide the procedures required by *Wolff*.

In the instant case, appellees "concede[ ] that the [appellant] was placed in SHU and deprived of his liberty after a Superintendent's Proceeding which failed in certain particulars to conform to the requirements of procedural due process established in *Wolff* v. *McDonnell*, 418 U.S. 539 (1974)." Appellees argue, despite the conceded infirmities in the predeprivation hearing, that no due process violation resulted from the hearing officer's failure to follow the state's own rules, which conform to the requirements set forth in *Wolff*. The district court held that "[b]ecause the procedures existed, but were allegedly not followed, no meaningful predeprivation hearing was possible." Appellees urge this proposition on appeal. They further urge that the Article 78 postdeprivation remedy, the mere threat of which resulted in appellees stipulating to appellant's release after 65 days confinement, was sufficient to satisfy due process. Appellees place heavy reliance on *Parratt* v. *Taylor*, 451 U.S. 527 (1981). We fail to see either the logic of appellees' argument or the connection between the instant case and *Parratt* or the Supreme Court's subsequent decision in *Hudson* v. *Palmer*, 468 U.S. —, 104 S.Ct. 3194 (1984).

Although a state employee's failure to conform to state law does not in itself violate the Constitution and

is not alone actionable under § 1983, *Davis* v. *Scherer*, 468 U.S. —, —, 104 S.Ct. 3012, 3019 (1984); *Pollnow* v. *Glennon*, — F.2d —, — (2 Cir. 1985), No. 84-7859, slip op. 2525, 2534 (2 Cir. March 12, 1985), the state regulation that was violated in the instant case merely reiterated what already was *required* by the Constitution. It has long been settled that unconstitutional conduct that *also* violates state law is still actionable under § 1983, *e.g.*, *Monroe* v. *Pape*, 365 U.S. 167, 187 (1961); *Screws* v. *United States*, 325 U.S. 91, 109-11 (1945) (plurality opinion); *United States* v. *Classic*, 313 U.S. 299, 326 (1941); *Home Tel. & Tel. Co.* v. *Los Angeles*, 227 U.S. 278, 282-85 (1913), and that exhaustion of state tort and administrative remedies is not required. *Monroe*, *supra*, 365 U.S. at 183; *Patsy* v. *Board of Regents*, 457 U.S. 496, 516 (1982).

Allegations of procedural due process violations by certain individual government employees, as opposed to direct challenges to state procedures or the lack thereof, have long been accepted as constituting state action and forming the basis for a claim under the civil rights statutes. *See*, *e.g.*, *Monroe*, *supra*, 365 U.S. at 172; *Home Tel. & Tel. Co.*, *supra*, 227 U.S. at 278, 282-85; *Mansell* v. *Saunders*, 372 F.2d 573, 576 (5 Cir. 1967).[4] The requirements of the due process clauses are directed specifically to the federal and state governments. They require the promulgation of laws and regulations providing for

[4] As Justice Harlan stated in his concurrence in *Monroe*:

"No one sugests that there is a difference in the showing the plaintiff must make to assert a claim under § 1983 depending upon whether he is asserting a denial of rights secured by the Equal Protection Clause or a denial of rights secured by the Due Process Clause of the Fourteenth Amendment."

Monroe, *supra*, 365 U.S. at 199 (Harlan, J., concurring).

regular procedures which the government must follow before it may deprive an individual of life, liberty or property. The execution of those laws and regulations also must conform to due process; otherwise the due process clause, with its guarantees of regular and predictable procedures, becomes a cipher. It is beyond cavil that due process requires more than the mere *promulgation* of laws and regulations which, if followed, would preserve the most fundamental of rights.

In *Parratt*, the Supreme Court based its decision, in part, on the fact that "the deprivation occurred as a result of the unauthorized failure of agents of the State to follow etstablished state procedure." *Parratt*, *supra*, 451 U.S. at 543. Appellees here argue, based on this statement, that no predeprivation hearing was possible in the instant case because the procedures provided for by the state were not followed.

First, appellees, and the district court, apparently confuse the deprivation of a liberty interest with the denial of the constitutional right to procedural safeguards which is implicated by that interest. It must be remembered that the Constitution does not prohibit deprivations of liberty per se. The Constitution prohibits deprivations of liberty *without due process*. The denial of a constitutionally-sound predeprivation hearing is a separate and distinct injury from the loss of liberty.

Second, although the denial of due process may have been "unauthorized", the deprivation of liberty at issue here does *not* appear to have been "unauthorized" as that term is meant by *Parratt*. *Hudson* v. *Palmer*, *supra*, makes clear that the question of whether the deprivation of a protected interest was negligent or intentional is not

of constitutional dimension. What does matter, however, is whether the conduct of the state's agent that resulted in the deprivation was such as to make the injury unforeseeable when viewed from the position of one who possesses the state-delegated authority to grant a hearing when circumstances and the Constitution so require. It is at least a question of fact whether the decision to place appellant in the SHU was made by "officials with final authority" over that decision. *Burtnieks* v. *City of New York*, 716 F.2d 982, 986 (2 Cir. 1983). Unlike the deprivation of property that occurred in *Parratt*, here the responsible state officials who had the power to grant appellant a hearing obviously knew that appellant was in peril of being deprived of his liberty interest. In fact, he was *given* a hearing, albeit a deficient one. Thus, the deprivation of liberty was neither "random" nor "unauthorized". *See Loudermill* v. *Cleveland Board of Education*, 721 F.2d 550, 562 (6 Cir. 1983), *aff'd*, — U.S. —, — (1985), 53 U.S.L.W. 4306 (U.S. March 19, 1985); *Burtnieks, supra*, 716 F.2d at 988-89.

Finally, *Parratt* did not alter the fundamental tenets of due process. *Parratt, supra*, 451 U.S. at 544. Absent some exigency that requires summary action by the state, *e.g.*, *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950); *North American Cold Storage Co.* v. *Chicago*, 211 U.S. 306 (1908), or circumstances that render a pre-deprivation hearing impossible as a practical matter as in *Parratt*, the opportunity to be heard *before* the state deprives an individual of life, liberty or property is still the "root requirement" of the due process clause. *Loudermill, supra*, — U.S. at —, 53 U.S.L.W. at 4308, *quoting Boddie* v. *Connecticut*, 401 U.S. 371, 379 (1972). It is abundantly clear that disciplinary segregation implicates a sufficiently strong liberty interest as to require notice

of the charges and, as the word "hearing" suggests, *some* opportunity to present a defense. *Wolff*, *supra*, 418 U.S. at 563-72; *McCann* v. *Coughlin*, *supra*, 698 F.2d at 121; *Powell* v. *Ward*, *supra*, 542 F.2d at 104. The opportunity to be heard at a meaningful time and in a meaningful manner has not been satisfied when the first such real opportunity is afforded after an inmate has already been in the SHU for 65 days. "The point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures." *Loudermill*, *supra*, — U.S. at —, 53 U.S.L.W. at 4308. Since appellant was denied such adequate procedures before punitively being deprived of his liberty, and since it was not impossible or impracticable to provide such procedures, the conclusion is inescapable that appellant was denied due process. *Parratt* and the other cases upon which appellees rely are not to the contrary. In those cases to which the reasoning of *Parratt* was applied to deprivations of liberty, the deprivation itself was "random and unauthorized" and a predeprivation hearing was impossible. *E.g.*, *Thibodeaux* v. *Bordelon*, 740 F.2d 329, 338 (5 Cir. 1984); *Daniels* v. *Williams*, 720 F.2d 792, 795 (4 Cir. 1983), *cert. granted*, 53 U.S.L.W. 3626 (U.S. February 26, 1985) (No. 84-5872). *Parratt* and its progeny are inapposite here.

III.

In view of our holding that an adequate prior hearing was required, a postdeprivation hearing, by way of an Article 78 proceeding or an action for damages in the Court of Claims, is inadequate, by definition, to meet the requirements of due process. This may be tautological, but it is a point that appears to have been missed by

appellees and by the district court. Once a cause of action for a constitutional violation accrues, nothing that the state does subsequently can cut off the § 1983 claim.

To summarize: We hold that, on the facts alleged in the complaint, the deprivation of appellant's liberty was neither random nor unauthorized and, as such, the state, through its agents, was obligated to provide an adequate hearing *before* the decision to discipline appellant was made final. We therefore reverse the judgment of the district court dismissing the complaint for failure to state a claim and remand for further proceedings consistent with this opinion.

Reversed and remanded.